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SUPREME COURT, U.S.
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CASE NO. 85-1074

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

STATE OF FLORIDA,

Petitioner,

vs.

JERRY HALIBURTON,

Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

AND APPENDIX

CHARLES W. MUSGROVE
Attorney for Respondent

Congress Park, Suite 1-D
2328 South Congress Avenue
West Palm Beach, FL 33406
(305) 968-8799

QUESTIONS PRESENTED FOR REVIEW

Respondent would respectfully reword the points as follows:

I A. WHETHER REFUSAL OF POLICE TO ALLOW AN ATTORNEY TO SEE HIS CLIENT, EVEN AFTER A JUDGE ORDERS THAT HE BE ADMITTED VIOLATES THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION OR THE SIXTH AMENDMENT RIGHT TO COUNSEL AND REQUIRES SUPPRESSION OF THE RESULTING STATEMENT.

B. WHETHER CERTIORARI SHOULD BE DENIED WHERE A NEW TRIAL IS ALSO REQUIRED BECAUSE THE PROSECUTOR MADE AN IMPERMISSIBLE REFERENCE TO APPELLATE REVIEW.

II WHETHER THE SUPREME COURT OF FLORIDA CAN BE SAID TO HAVE REFUSED TO CONSIDER THE STATEMENT GIVEN TO POLICE HARMLESS WHERE THE OTHER PERSONS TESTIFYING AS TO ALLEGED CONFESSIONS WERE SO BIASED AGAINST RESPONDENT THAT THEY ATTEMPTED TO KILL HIM WITH A GUN.

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PREFACE

Respondent accepts Petitioner's preface, and will use A for Petitioner's appendix and RA for Respondent's appendix.

OPINIONS BELOW

The Opinion of the Florida Supreme Court in this cause is now reported at 476 So.2d 192.

FEDERAL CONSTITUTIONAL PROVISION INVOLVED

Also at issue in this case is the Sixth Amendment, which provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

The Petition does not do justice to the facts of this case. For example, Petitioner claims Respondent was informed that an attorney had called and that Respondent made a continuous valid waiver of his presence. It concedes a small credibility problem in its Footnote 3. The officer who said he told Respondent is contradicted not only by his own prior testimony and by the officers he claimed were there when he said it, but also by his failure to record this vital warning (A 18-19).[1/]

[1/] Petitioner says the Florida Supreme Court was obliged to accept its version on this question. However, the appellate court is only required to accept credible evidence, and this was not. Since Petitioner vouched for the witnesses who contradicted this version, they are bound by those witnesses under Weinstein v. State, 269 So.2d 70 at 72 (Fla. 1 DCA 1972). In any event, there was no finding of fact (A 14-15) and the Judge was presented with argument that nothing mattered as long as Respondent never asked for counsel (RA 1-2). There is insufficient basis here to reconstruct any implied findings of fact within the meaning of Townsend v. Sain, 372 US 293 at 314 (1963).

The alleged continuous valid waiver is also suspect. If the officer who claimed to have told Respondent an attorney called is to be believed, then his alleged response must also be accepted, to wit:

> "Well, he didn't say yes he wanted to talk to him and he didn't say no, he didn't want to talk to him. He just sort of slunked his shoulders, like, I will wait until they get here and see." (A 16-17)

Petitioner concedes the attorney hired by Respondent's sister was not allowed to see him. However, it neglects to mention that police also chased him from the station (RA 3-11) and forced him to have a Judge call twice to order he be let in (A 3). At least 20 minutes passed from the Judge's first unsuccessful call at 4:18 until he finally got in at 4:40 (RA 12). As the footnote (A 3) to the Supreme Court's opinion notes, the same department later refused entirely to honor a similar order, and was cited for contempt.

Petitioner also omits that the attorney retained by Respondent's sister had an ongoing relationship with the family in the sense that the same sister often hired him to represent family members. He was not sure whether Respondent had been one of them in the past (RA 13-14).

The evidence on which the State claims harmless error is the alleged confessions to Respondent's brother and the brother's girlfriend. Both waited many months to come forward, and did so only after they became enraged over an incident involving the girlfriend. The brother was so mad he tried to kill Respondent with a gun (RA 15-16). The overwhelming animosity and bias of these witnesses makes their credibility so suspect that no Court could say the improper reception of other evidence is harmless.

During closing argument to the jury, the prosecutor dwells at length on the contradictions in the various statements which Respondent made (RA 17-24).

Many other errors were complained of on appeal but were not addressed by the Florida Supreme Court because it was ordering a new trial on other grounds. One of the clearer errors is

this. During voir dire, the prosecutor had this discussion with a prospective juror:

> "MR. BARKIN: Do you understand, Mrs. Devries (sic), that even if you sat on the jury and you recommended that, it's still up to the Judge to make a final decision as to sentence?
>
> MS. TOMIES: Yes.
>
> MR. BARKIN: Your recommendation is advisory only?
>
> MS. TOBIES: Yes.
>
> MR. BARKIN: And even if the appellate-- you understand that the sentence is reviewed by the Court of Appeals--" (RA 25)

Respondent immediately objected and moved to strike the venire and start anew. The Judge refused to strike the panel or even to give a curative instruction. (RA 25-27).

REASONS NOT TO GRANT THE WRIT

Both legally and factually, this case is not like either Miranda v. Arizona, 384 US 436 (1966) or Burbine v. Moran, 753 F.2d 178 (1st Cir. 1985). It is more like Escobedo v. Illinois, 378 US 478 (1964). This Court will have ample opportunity to address further ramifications of Miranda elsewhere, so should not grant review in this case. It simply refuses to condone police conduct which holds a defendant incommunicado from 6:30 a.m. on, chases his attorney away from the jail, and will not even let him in when ordered by a Judge, and all without a clear refusal to talk to counsel if available. Such conduct may implicate Fifth Amendment rights, but it also violates the Sixth Amendment. There is no great confusion of decisions on that conduct--it is uniformly condemned.

ARGUMENT

I A. WHETHER REFUSAL OF POLICE TO ALLOW AN ATTORNEY TO SEE HIS CLIENT, EVEN AFTER A JUDGE ORDERS THAT HE BE ADMITTED VIOLATES THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION OR THE SIXTH AMENDMENT RIGHT TO COUNSEL AND REQUIRES SUPPRESSION OF THE RESULTING STATEMENT.

B. WHETHER CERTIORARI SHOULD BE DENIED WHERE A NEW TRIAL IS ALSO REQUIRED BECAUSE THE PROSECUTOR MADE AN IMPERMISSIBLE REFERENCE TO APPELLATE REVIEW.

This case does not involve the same issue as in Burbine v. Moran, supra, where the issue was what effect failure to tell Burbine a lawyer called on his behalf had on validity of his rights waiver. Though there is a question as to whether Respondent was told of counsel's call, it plays no direct role in the Florida decision. It is not even a question of whether to adopt cases which refuse to require police to honor an attorney's demand to speak to a suspect on the phone, such as Wheeler v. State, 705 P.2d 861 (Wyo. 1985), where Wheeler's companions hired a lawyer after he was arrested for drunk driving, and State v. Blanford, 306 NW2d 93 at 96 (Iowa 1981), where the lawyer who was handling Blanford's divorce called after he was arrested for domestic violence. There are others which do require that police give an attorney telephone access. Respondent prefers the latter view, because the former view encourages police to hold suspects incommunicado, and does nothing to dissipate the inherent coercion this Court described in Miranda (384 US at 465-466). But this Court need not answer that question here. No case cited has condoned refusal to let a retained[2/] lawyer in when he is right outside, not even Dunn v. State, 696 SW2d 561 at 569 (Tex.Cr.App. 1985).[3/]

[2/] Though the State refers disparagingly to "unrequested" counsel, it does not argue that counsel was not retained counsel. In almost every case, a relative hires the lawyer whose exclusion from the station or jail requires suppression, e.g. (a) one or both parents in Weber v. State, 457 A.2d 674 (Del. 1983); State v. Jones, 19 Wash.App. 858, 578 P.2d 71 (1978); Lewis v. State, 695 P.2d 528 (Okl. 1984); Yates v. State, 467 So.2d 884 (Miss. 1984); Lodowski v. State, 302 Md. 691, 490 A.2d 1228 (1985); (b) wife in State v. Haynes, 288 Or. 59, 602 P.2d 272 (1979); Commonwealth v. Hilliard, 471 Pa. 318, 370 A.2d 322 (1977); and (c) sister in State v. Alford, 225 So.2d 582 (Fla. 2 DCA 1979); and Burbine v. Moran, supra. Who else could do so? The accused who is incommunicado surely cannot.

[3/] Cited cases which superficially seem to reach a contrary result are distinguishable because they involve attorneys who were not retained by anyone, such as People v. Gott, 117 Cal.App. 3d 125, 173 Cal.Rptr. 469 (1981), where a public defender had neither been appointed nor requested; Hance v. Zant, 696 F.2d 940 (11th Cir. 1983), where counsel who sought the accused had not been retained by anyone and was never denied access; and State v. Chase, 55 Ohio St.2d 237, 378 NE2d 1064 (1978), where counsel did not even claim to represent the accused.

Respondent submits that there can be no valid waiver of counsel if the suspect is kept in the dark about the fact that he has counsel or that counsel is immediately available on the telephone or in person. Absent such knowledge, there cannot be a knowing and intelligent waiver. This very case illustrates the point. Respondent was foolishly continuing to incriminate himself in hopes he could not be charged with murder. If Officer Bryant is to be believed, his response to news of his attorney was not that he did not want to speak to counsel, only that he did not want to wait. He would see when the attorney arrived. How could police continue to rely on that earlier waiver after counsel arrived? Here at least, they had to tell him counsel arrived or suffer the sanction of the exclusionary rule. However, whatever this Court concludes about waiver, the exclusion of counsel also violates the Sixth Amendment.

This case has always been more like Escobedo v. Illinois, supra, where police also kept counsel out improperly. The most applicable part of Miranda is Footnote 35, which reads:

> The police also prevented the attorney from consulting with his client. Independent of any other constitutional proscription, this action constitutes a violation of the Sixth Amendment right to the assistance of counsel and excludes any statement obtained in its wake. See People v. Donovan, 13 NY2d 148, 193 NE2d 628, 243 NYS2d 841 (1963) (Fuld, J.). (384 US at 465)

The State says the right to counsel does not attach until after formal proceedings. While some proceedings, such as lineups, may be conducted without counsel, there is clearly a right to counsel which attends interrogation before charges are filed. Escobedo, supra, was a preindictment interrogation. Any time counsel wants to see his client, the client must be made available unless he refuses. As was noted in Escobedo, supra, and Davis v. State, 287 So.2d 399 (Fla. 2 DCA 1973), denial of counsel at interrogation may render all subsequent proceedings meaningless and hollow.

For both the Fifth and Sixth Amendment violations, this Court should agree the evidence here is properly suppressed. But,

if it disagrees, it should approve the order granting a new trial because of the other clear error in the prosecutor's comment during voir dire.[4/]

It is wrong to tell the jurors that their decision will be reviewed on appeal because it denigrates their function. State law condemns it as fundamental error in Pait v. State, 112 So.2d 380 (Fla. 1959), saying in part:

> ". . . the jury is being told that in some measure they could disregard their own responsibility in the matter and leave it up to the Supreme Court." (112 So.2d at 384)

This Court condemned a similar comment in the sentencing phase of a capital case in Caldwell v. Mississippi, 472 US ___, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985).

In the case at bar, the entire jury venire was contaminated by the prosecutor's statement. This Court has its chance to address the Miranda issue elsewhere, so it is pointless to even consider reviewing the new trial order of the Florida Supreme Court here without considering this alternate ground on which a new trial is also required as a matter of State law under Pait v. State, supra. If the new trial order is right for any reason, certiorari should be denied.[5/]

II WHETHER THE SUPREME COURT OF FLORIDA CAN BE SAID TO HAVE REFUSED TO CONSIDER THE STATEMENT GIVEN TO POLICE HARMLESS WHERE THE OTHER PERSONS TESTIFYING AS TO ALLEGED CONFESSIONS WERE SO BIASED AGAINST RESPONDENT THAT THEY ATTEMPTED TO KILL HIM WITH A GUN.

The State accuses the Florida Supreme Court of refusing to consider the harmless error doctrine in this case. The charge seems frivolous in view of that Court's ruling in State v. Murray, 443 So.2d 955 at 956 (Fla. 1984). For just a few examples of the

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[4/]Were the error not so blatant, Respondent would simply note that any reversal would have to give the Florida Supreme Court a chance to consider these other issues, as in California v. Green, 399 US 149 at 169-170 (1970).

[5/]That is why this Court refuses to issue writs of certiorari to review State decisions which rest on adequate independent State grounds. See e.g. Fay v. Noia, 372 US 391 at 428 (1963).

Court applying the doctrine to capital cases, please see Sullivan v. State, 303 So.2d 632 (Fla. 1974); Proffitt v. State, 315 So.2d 462 at 464 (Fla. 1975); Meeks v. State, 339 So.2d 186 at 190 (Fla. 1976). In Richardson v. State, 246 So.2d 771 at 774 (Fla. 1971), the Court suggested that the harmless error statute stands in para materia with all other statutes and rules.

There are two other flaws to the State's theory. First of all, the evidence was not harmless in its possible effect on the jury. This is partially because the evidence given by Respondent's brother and his girlfriend is not credible enough to assure that any other evidence is harmless. When they waited so long, and then came forward only after they got so mad that the brother tried to kill Respondent with a gun, they demonstrated the depth of their bias and animosity.

It is also because the prosecutor made such extensive use of the statement in closing argument. His recurring theme was that Respondent lied to police. In these circumstances, the evidence is not harmless.

Thus, it seems clear that the Florida Supreme Court did not refuse to consider the harmless error doctrine. It simply found it inapplicable. But, were it otherwise, it is very hard to see how the Court's determination that the error was not harmless raises a Federal question or gives this Court jurisdiction, and that is the second flaw. In Milton v. Wainwright, 407 US 371 (1972), this Court found an alleged constitutional error harmless. This Court may not condone a constitutional error without making its own independent determination that the error is harmless. However, that does not make a Federal question out of a State determination that the error is not harmless. There is no reason for this Court to review that determination.

CONCLUSION

There is no good reason for this Court to accept this case. It is not the same as Burbine, supra, or Miranda, supra. It

involves a police department so intransigent it will not even honor a Judge's order to let an attorney in to see his client. Such conduct is condoned only in a police state. It implicates the Sixth Amendment right to counsel as well as Fifth Amendment rights. Failure to tell Respondent his counsel was there is especially inappropriate in view of the temporal nature of Respondent's earlier waivers. In any event, there are other matters in this cause which require a new trial.

Respectfully submitted,

Charles W. Musgrove

CHARLES W. MUSGROVE
Attorney for Respondent

Congress Park, Suite 1-D
2328 South Congress Avenue
West Palm Beach, FL 33406
(305) 968-8799

APPENDIX

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Now, why couldn't Mr. Burford have expressed his Client's right to remain silent before he saw them. WyWhy wasn't it effective while he was out in the hall and Mr. Haliburton was in the interrogation and furthermore, why shouldn't Mr. Haliburton be told that the man was out in the hall. For the very reasons that I just mentioned. Number one, as a technical matter, I must agree that Mr. Burford was retained as this Defendant's lawyer. Now, we got into something when he was testifying, that most of the time when he is retained, he is retained by the Defendant's members of the family, it's rare when I am contacted by the Defendant himself. Technically, as a matter of law, I will argue that the Attorney has to visit the prisoner and ratify the families decision and that's the point that the Attorney-Client privilege attaches. Why shouldn't we have allowed that to happen here? It could have happened here. Ittcould have happened here with Mr. Burford later had no already decided on his own that he wanted to talk to the Police and not already decided on his own that he didn't need an attorney and didn't want to talk to an tattonney at that point. But, what already happened was because he was willing to talk and because he said that he didn't want an attorney, the interrogation had alrady begun and under these circumstances, if it's a proper interrogation, it should continue because the Defendant can stop it at any time. This one never did. Even though we have an identifiable Attorney, who is out in the ahall, the Defendant's waiver in this case, and

in this case is like this remains free and voluntary, if miranda as mandates any meaning at all, again we are telling them athat we are filling the Miranda mandates and if they have been followed-- I am going to wrap it up with a short discussion of the previous cases.

One of them is a case that just came out, that appears to support the Defense. It's a case out of the Second District, Deluka(phonetic) versus State. I will not -- very briefly I will go into this in the memos, I suppose that the Court there said that the State concedes that prior at the jail he was visited by the Attorney. He never informed the booking officer, at the jail that he represented him and did not awant him wquestioned with out the Attorney's presence. What that involved, was that he spoke before the investigation and then exercised that he could do that because he was representing the man and the man had, himself had obviously expressed his wish to have an attorney and was following his advise. I don't think that case supports the Defense at all. There it is, just in this case, they say that it does. State versus Craig, it's an interesting case back in 11970. I want to burden you a little with quotation. This is a case where the Fourth District Reversed the conviction, saying that the Defendant hasdnot freely and voluntarily waived his rights, because at some point in the game he said, well, they said that he was equibocable about the exercise of his rights. The Florida Supreme Court, State versus Craig, 237 Southern Second 738, it's in the 1970 said that the

what, somewhere around 15, 20 minutes, half an hour, maybe, before 3:58, somewhere in that neighborhood.

Q Okay. Again, you can't be exactly sure?

A Can't be sure of the time, no.

Q Okay. But at sometime you did get to the station?

A Yes.

Q Okay. Do you recall approximately the time you got there?

A The only time reference I have is I made notes after I was ejected from the Detective Division in the lobby. I made a note 3:58 that I had been refused permission to see Jerry Haliburton.

My recollection is that I made that note in the lobby of the police department after I had been ejected and it probably would have been within a minute or two minutes after I had left the Detective Division, however long it takes to walk downstairs.

Of course, there was a little frustration on my part as to what action I was going to take so that would have taken a little time.

Q Okay. So at the time you recorded this 3:58 time period, you had already been thrown out of the Detective Bureau?

A Yes.

Q They already told you you were not going to be able to see Jerry Haliburton, is that correct?

A That's correct.

Q Do you recall who it was that told you that?

A The person who ejected me?

Q If there are more than one, whoever.

A I know that -- I'm pretty certain it was Gabbard. I was looking at the officers who were witnesses today, trying to see if I recognize the gentleman that I had seen. I know all of them when I see them but I am not sure of their names. I believe it was Gabbard.

Q Okay. Did you also speak with anybody else besides Lieutenant Gabbard, now Captain Gabbard?

A I believe I spoke to Jamason.

Q Do you recall at any time talking with Captain Griffin?

A I may have. I believe he was there.

Q Okay.

A I am not sure whether I talked to him or not. It wasn't a whole lot of talk going on. Most of the talking was being done by the fellow who ejected me, whom I believe is Gabbard.

Q Okay. Can you characterize this attitude this individual had, this officer? Was he friendly and polite?

A I was extremely surprised by his attitude. I know all of them. I knew him by sight. He was very obnoxious, belligerent. I was taken back because usually I am treated with respect as I treat them with respect.

I know him. I've seen him before. We had been friendly.

All of a sudden he was getting red in the face, "Get out; leave."

I'm saying, "Wait a minute. Wait a minute. What's this all about?"

I eventually said, "Let me talk to Jamie. Let me find out what's going on. I have always treated you with respect."

He said, "The man doesn't want an attorney. Get out, leave," almost physically threw me out of the Detective Division.

Q Had you ever told him or tried to tell him anything about whether, you know, that you had been retained?

A Oh, yes, that was one of the first things I said, "I want to Jerry Haliburton. I have been retained. I want to see him."

Q That didn't phase him, apparently?

A No.

Q What was your reaction upon being ejected from the Detective Division?

A Well, about 15 years of practice at that time, I guess it had been around 14 years of practice, I never had anything like that happen, either being ejected or treated that way by any of the officers in any department.

MR. BARKIN: I object. This feeling about being ejected isn't really relevant.

MR. KLYMAN: I think he can just characterize the whole situation.

THE COURT: Go ahead.

Objection overruled.

THE WITNESS: So I was kind of doubly upset. As an attorney, I was extremely upset that I wasn't permitted to see a client that I had been retained to see and, personally, I was upset because of the treatment I was given, so I, when I was thrown out, I was bound and determined I was going to get in, plus I had the suspicion which had been planted by the sister that maybe he was being mistreated. That would be an explanation of why they were so belligerent, why this unusual activity, why this unusual thing happening, refusing admittance of an attorney.

That was in my mind. That made me very

determined to get in to see Jerry Haliburton.

BY MR. KLYMAN:

Q What steps did you try to take to get in to see Jerry Haliburton?

A I thought what I could do. I said I need judicial ruling, so I called my office, asked my secretary to get the name of the duty judge and the number.

Q Who was that?

A It was Judge Barkett.

My secretary called me back. I gave her the pay phone number. I was using a pay phone there in the lobby.

She called me back, gave me -- told me it was Judge Barkett, gave me the number.

I immediately called Judge Barkett.

Q Do you happen to recall what the nature of the conversation was with Judge Barkett?

A I recall on deposition -- I still don't have it straight as to how many calls were made to Judge Barkett. It could have been the very first call I made to her she patched in Assistant State Attorney Paul Moyle to get the State's side on the issue or it could have been when I first talked to her she said, well, let me get ahold of the State, got the number of the pay phone and called me right back

after she got Moyle patched on.

It would have been a matter of a few minutes, in any event.

Q Okay.

A Then Mr. Moyle and Judge Barkett were on a conference phone with me and I explained the situation and she ruled and advised Mr. Moyle that her ruling was that I would be permitted to see him and she was going to call, I think she said, Chief Jamason and give instructions to let me in.

Q Okay. Did you ever record what time it was you received these instructions from Judge Barkett?

A Yes, I did. That was the other time I noted on my notes, it was 4:18 was when I finished that conversation.

That is the joint conversation with Mr. Moyle, Judge Barkett and myself.

Q Okay.

So, as far as the times that you recorded, I take it the only times you recorded was 3:58 when you were down in the lobby after being ejected from the Detective Division, is that right?

A That's right.

Q And 4:18 is when you concluded your consultation with Judge Barkett and Paul Moyle in

reference to the situation, is that right?

A That's correct. Those two times I could be certain of.

Q Okay. Did you use your watch or did you use the clock in the Detective Division?

A I used my own watch.

Q To the best of you knowledge, was it accurate?

A Yes, it was accurate. I was meeting all my appointments on time.

Q Okay. But as far as the number of conversations you had with Judge Barkett, would it be fair to say there was at least two of them?

A At least two.

Q And possibly three?

A Possibly three.

Q Okay.

A Possibly four.

Q All right. So it was around 4:18 that you heard from Judge Barkett you were going to be let in?

A Right.

Q Upon hearing that, did you try to go back in the Detective Division?

A Yes. Judge Barkett said, "Give me sufficient time to call, give the orders and go on in."

I waited about five minutes or so.

Q Was that down in the lobby?

A In the lobby, giving her time to call and give the instructions and after that period of time, five minutes or so, I went over to the sergeant at the desk and informed him that Judge Barkett had ruled that I was to see Jerry Haliburton and I wanted to go up and see him.

I got on his phone and talked to somebody and he said, "Well, their position is that you cannot see him," words to that effect.

So I said, "Fine."

I went back to the pay phone, called Judge Barkett again and said, "Judge, they will not let me see him. Their position is they're still not going to let me see him."

That's where I am not sure whether there was another call or not.

She said in that conversation that she was going to call them again and give them explicit instructions to let me in and if they did not let me in I was to call her back and she was going to come over personally and see that I was admitted.

Then, shortly after that conversation, I talked to the sergeant at the desk again, told him what she said, that she would be calling again, somewhere in there, and he made another call and he said, "Well,

their position is you're not to see him."

I was walking back toward the pay phone again and then he signaled to me and said there's been a change of decision. You are now able to see him.

That's where the fourth call may have come in, I may have called Judge Barkett to inform her they were complying.

I don't recall whether I did or not.

Q Do you recall what time it was you finally did get in to see Jerry Haliburton?

A I really couldn't say. I can only estimate.

Q Sometime after the 4:18 time that you recorded, is that right?

A Yes.

Q Now, you say you have been an attorney about 15 years, is that right?

A Right along that line.

Q Have you practiced criminal law during that period of time?

A Throughout that period, yes.

Q You say you were taken back as far as the whole way you were treated, so on and so forth. I take it this sort of thing never happened before?

A No, it did not.

MR. BARKIN: I am entering an objection because,

told Sergeant Bryant to come on out and I talked to Bryant and we stopped the questioning.

Q I think you indicated a coffee break and then talked to him --

A I said and it's reflected on the tape, I believe when I called Sergeant Bryant out, I said, how about taking a coffee break and the real reason was to tell Sergeant Bryant what was going on, but we did drink some coffee, too.

Q All right. And then what happened at 4:20?

A At -- I guess -- 4:20 to 4:40, just doing paperwork and talking to Captain Griffin, Lieutenant Gabbard and so forth.

At 4:40, approximately 4:40 p.m., attorney Tom Burford arrived at the Detective Division, or came.

Q That's when you saw him for the first time?

A That's when I saw Mr. Burford the first time.

Q Is that about when Mr. Burford went to talk with Mr. Haliburton?

A Yes, approximately 4:40 to 4:45.

Q And at that point Mr. Haliburton indicated he didn't want to speak further to you?

A Mr. Burford spoke with him until approximately 5:10 p.m. and, yes, 5:10 p.m. and when Mr. Burford came out, he and I went back in and talked to -- I believe

THE COURT: Thank you.

CROSS EXAMINATION

BY MR. BARKIN:

Q Mr. Burford, you state that on August 13th, you had been retained as the attorney to represent Jerry Haliburton, is that correct?

A That's correct.

Q However, you had no conversation with Jerry Haliburton on that day, had you?

A Not prior to being admitted to the Detective Division, no.

Q In other words, Jerry Haliburton never said to you, Mr. Burford, or Tom, or anything of that nature, I would like you to represent me?

A No.

Q The call had come through his sister?

A Yes.

Q And if I understand it as you explained to me before, you have represented members of the Haliburton family on various matters in the past?

A Yes, and usually, it was Helen who initiated the contact and asked me to represent somebody.

Q However, I think you said you -- you said you can't remember representing this particular man, Jerry Haliburton?

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A I am not sure if I did or not. I may have many years ago. I'm not sure.

Q There was no ongoing attorney-client relationship between you?

A Oh, no. I work on individual case basis. If I had represented him, it would have concluded with whatever case I had represented him on.

Q And similarly, there was no pending case, whether criminal or civil, involving Mr. Haliburton at the time that you were representing him on?

A No.

Q I want to talk a little bit about your phone calls. You mentioned there might have been a first phone call that you called to the station, is that correct?

A There definitely was a first phone call in the morning. I called the Detective Division to find out if Jerry Haliburton were, in fact, there and also there was a question of whether he had been booked and charged and I asked about that, too, because that's what Helen, his sister, had said, they had held him there since 6:00 o'clock. He hadn't been charged with anything, hadn't been booked on any charges and I confirmed that, that he had not been booked or charge with anything at the time I called in the morning, that he was there and had not been booked and charged.

BY MR. BARKIN:

Q Have you been promised that you would never be prosecuted?

A No.

MR. BARKIN: I have no further questions at this time.

THE COURT: Cross, Mr. Bailey?

CROSS-EXAMINATION

BY MR. BAILEY:

Q Do you hate Jerry?

A Excuse me?

Q Do you hate Jerry?

A No.

Q Do you love him?

A No.

Q You shot him?

A Well, I shot at him. I didn't learn until after he was shot --

Q Hum?

A Until my brother approached me the next day or a couple days later.

Q You shot at him and the bullet struck him and put him in the hospital, is that correct?

A I didn't know if it struck him or not at that time.

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Q You shot with intent to kill, correct?
A Yes.
Q And you testified to kill, correct?
A Excuse me?
MR. BARKIN: Objection. That's testimony by defense counsel.
THE COURT: Sustained.
BY MR. BAILEY:
Q When was it you went to anybody and told them about these conversations you supposedly had with Jerry?
A About the murder and all?
Q Um-hum.
A It was on a Tuesday.
Q What month, what year?
A It was in March.
Q March?
A '82.
Q '82?
A Right.
Q Okay. The first conversation you say occurred in December of '81, is that correct?
A Between Jerry and I?
Q Yes.
A Yes.
Q And the next conversation occurred about a month

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All right. Well, you all know what happened from there. The crime scene led to a fingerprint of Jerry Haliburton. They take Jerry to the station. Where is his fingerprint found? Three full fingerprints are found on a jalousie, one of the jalousies that had been removed.

Now, imagine, now, the feelings of the Defendant in this case? He's been brought down to the station. He knows he's being questioned for a murder. He knows they came to his house with a warrant. He knows there's some evidence there, that it's making them suspect him,but at this point he does not know what it is, so what does he do? He stonewalls.

First of all, he starts out by saying he knows something links him to Donald Bohanan but he's not sure what. I was smoking there in the alley with him. Then he realizes he's been in there through that house.

There's got to be more to it, so he's got to change his story a little bit, so what does he say? He changes it then. He said, now, he was upstairs smoking with Bohanan.

Now, Mr. Bailey told you, he raised the inference, he told you who would get close enough, who

would be on the bed with Donald Bohanan? Well, if you heard the statement of Jerry Leon Haliburton, as he is beginning to stonewall, he tells you I was sitting on Don's bed.

MR. BAILEY: Judge, may we approach the bench for purposes of argument?

THE COURT: Yes.

(Whereupon, the following proceedings were had in the presence, out of the hearing of the jury.)

MR. BAILEY: Judge, I'm going to move for a mistrial on the prosecutor saying "stonewalling." That's referring to silence.

MR. BARKIN: It's referring to the statement he gave to the police.

MR. BAILEY: No, stonewalling is being silent and I think it highlights it at trial, his righttto remain silent at trial, also.

THE COURT: I am going to deny the motion for mistrial.

Mr. Barkin, however, I will instruct you not to refer to Mr. Haliburton's lack of competence in any manner.

MR. BARKIN: His what?

THE COURT: His lack of comments.

MR. BARKIN: What I meant by stonewalling, he

was telling a story that was not true. I will make that more clear to the jury.

THE COURT: You should put it that way rather than stonewalling.

Do you wish me to instruct the jury to disregard it?

MR. BAILEY: No. My position to instructing them is to highlight the error in their mind.

MR. BARKIN: I will say to the jury by stonewalling I mean telling a story not true.

MR. BAILEY: I would object to any further use of the word.

THE COURT: Well, you may without saying that, if that's Mr. Bailey's objection, do not employ that particular term.

MR. BARKIN: Okay.

(Whereupon, the following proceedings were had in the presence and hearing of the jury.)

MR. BARKIN: Jerry Haliburton is being evasive. Now, what does he say? He says he was on the bed smoking marijuana. Now, why is Jerry Leon Haliburton, himself, on the bed with Donald Bohanan? The answer is obvious, because he was over him at one time, he was over him on the bed. If the cops have any evidence to link him to that bed, he has to have an

explanation for it, and that's what he says, despite the testimony of all the other witnesses that he did not socialize with Donald Bohanan, that's his reason for saying he was there on Donald Bohanan's bed.

He says over and over and over and over again in the most serious, most sincere voice he can, lasting over a period of an hour and a half, two hours, no, I did not break into Donald Bohanan's apartment that night. No, I did not break into Donald Bohanan's apartment that night. I wouldn't have. I was wearing such nice clothes, my clothes were too good to break in that night. I was dressed well. I think he even said "dressed to kill," so why is he saying that now?

Because he does not want to get pinned with a crime but he wants to explain any evidence that might be found linking him to Bohanan's apartment and to Mr. Bohanan's bed, and we know the reason for it.

As he talks more, we see more of the reason. He acknowledges to the police, he says, yes, I'm a burglar. He figures the police know him, know who he is, but I didn't burglarize that night, and he tells you the reason why he's saying that

because at one point, and I think I wrote it down here, Defendant says what's burglary carry?

Sergeant at that time, Sergeant Houser, I don't know, five years.

Defendant Jerry Leon Haliburton, what's murder carry?

Life, the electric chair? Hey, I'm just a burglary, but his story was not washing. His story was not washing.

No one was buying it and you heard at one point Lieutenant Houser told him we got some fingerprints and then he figured his story is not jiving together because his story that he was just up there smoking marijuana in Donald Bohanan's bedroom does not correspond to his fingerprints being found on the jalousies.

So what is it now? It's time to but his losses.

After all, what does burglary carry, five years, ten years? What does murder carry? So that's when he tells you his story, he admits to doing the burglary. At that point he is cutting his losses.

Now, let's talk about the crime here involved. This was no mere -- he knows what he's facing and this is why he's telling the story, this

is why he's willing to concede the burglary. This is no mere crime of passion resulting from a bar fight, resulting from people who have a disturbance over the silly things that people get wound up in. This is a cold-blooded mutilation, and he has got to do everything to avoid being tagged with it.

So he shifts to these new grounds. He will -- he tells you one jalousies was already removed. The screen was bent. I removed some others, went in, but in shifting to this new ground, not only does he have to admit that he repeatedly said something that was not true to the police over and over, but other contradictions are now revealed in his statement because of the position he now must take.

He talks about his philosophy of burglaries. He says he never breaks into a house where people are at home but at the same time by his own story, he was there smoking marijuana with Donald Bohanan at 12:30 p.m. He left. Donald Bohanan was going to bed. He knew Donald Bohanan was home. It's logical, in any event, to believe that at 3:30 in the morning somebody is going to be home. Jerry Haliburton says of all the burglaries he did, there's never been anyone in the house. He's getting

nervous, now. They ask him what were you going to steal when you broke in? He said everything, the stereo, the TV, everything I could find.

Now, he's just revealed another contradiction because earlier in the taped statement he said he never takes stereos, he never takes TVs because they're too easy to trace. That's the first reference we have of the language he uses, too easy to trace.

Earlier he wouldn't have stolen those things. It was too easy to trace, but there at 3:30 in the morning, a neighbor who would be bound to recognize him, he would go in and while he's sleeping loot his entire living room, but he wouldn't get caught.

He said at the time he admitted to it, actually doing the burglary, he doesn't mess with knives. If there was a gun, though, he might take that. I like guns.

You recall earlier in his statement, he said he didn't mess with knives and guns at all. He's starting to slip a little. The facade is showing. The story he has concocted is starting to fall apart.

He talked about going to the party, alcohol, the marijuana he smoked and his quote was I

was fucked up that night. Then he realizes, well, that could get him in trouble, well, not so fucked up to go commit a murder.

He said that he dealt with Donald Bohanan by smoking with him, that most of the way he deals with people is to get high, so we know by his own statement that he was affected by other substances that night.

Basically, ladies and gentlemen, there's only --the evidence points to only one person as having been in that apartment, it points to nobody else and that it points to Jerry Leon Haliburton.

Now, the defense wants you to believe that Terry Cast did the murder. It's kind of an interesting contradiction they raise when they say that.

First they say you heard Dr. Hobin, he said this is a crime of rage, a crime of frenzy. The knife, a pocketknife, is a weapon of opportunity. Basically, like it was something that happened at the spur of the moment.

Yet, at the same time, to justify the tale he's telling you, he says, however, we know that screaming, clever Terry Cast, knowing that Jerry Leon Haliburton is the neighbor burglar, is

MR. BARKIN: You could envision a set of facts or circumstances under which you could recommend a sentence of death?

MS. TOBIES: Yes.

MR. BARKIN: Do you understand, Mrs. Devries (sic), that even if you sat on the jury and you recommended that, it's still up to the Judge to make a final decision as to sentence?

MS. TOBIES: Yes.

MR. BARKIN: Your recommendation is advisory only?

MS. TOBIES: Yes.

MR. BARKIN: And even if the appellate -- you understand that the sentence is reviewed by the Court of Appeals --

MR. BAILEY: Judge, I object.

THE COURT: Mr. Barkin, please avoid making statements of the law.

MR. BAILEY: Can I approach the bench?

THE COURT: Yes.

(Whereupon, the following proceedings were had in the presence, but out of the hearing of the jury venire.)

MR. BAILEY: Technically, a Motion for Mistrial is not appropriate because the jury hasn't been sworn, but I would make a motion in the nature of a

motion of a mistrial, ask it be excused, prosecutor misconduct by improper conduct in voir dire. He just went through, of course, it's not really your decision. The Judge makes it. Then after that it gets reviewed by a higher court.

That is a passing-the-buck type argument that perverts the law, perverts the jury's bearing of that responsibility and is improper. I move for a dismissal of this jury panel as a result of those comments, particularly the reference to the appellate process which does not review the sentence.

Well, I guess it does.

THE COURT: It does review the sentence. I'm going to deny the motion. I don't think it was a misstatement of the law, as such, but, frankly, it doesn't matter whether they understand that or not. The question is what's -- the question that's been asked.

Again, if you will zero in on that, Mr. Barkin, and keep it there.

MR. DAILEY: As an alternative, I would ask for a corrective jury instruction. I still maintain my prior motion but I do that as an alternative, as I believe I am required to by the rules.

THE COURT: In what manner corrective?

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MR. BOHN: Can I recommend one?

MR. BAILEY: You can recommend one. I don't think it can be corrected. That's what I maintained in my original motion about the comment about --

MR. BOHN: I was just going to recommend the Judge instruct that that again their role is render an advisory verdict and that the decision is with the Judge.

THE COURT: Well, I think that's what he's told them. I don't think that any misstatement has been made, but -- to poison the panel, but just stick to the questions, Mr. Barkin, all right?

(Whereupon, the following proceedings were had in the presence and hearing of the jury venire.)

MR. BARKIN: Mr. Heeland, do you have any moral, religious or ethical opposition to the death penalty?

MR. HEELAN: No.

MR. BARKIN: You could follow the law?

MR. HEELAN: Yes.

MR. BARKIN: Mr. Block?

MR. BLOCK: No.

MR. BARKIN: You could follow the law?

MR. BLOCK: Yes.

MR. BARKIN Miss Jasmond

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